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No. 96-1671

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

FRANKLIN D. RAINES, ET AL.,

Appellants,

vs.

SEN. ROBERT C. BYRD, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF APPELLEES

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 West 44th Street
New York, New York 10036-6690
(212) 382-6600
LOUIS A. CRACO, JR., Chair,
JAMES F. PARVER
Committee on Federal Legislation

DAVID P. FELSHER
Counsel of Record

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BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF APPELLEES

INTEREST OF AMICUS*

The Association of the Bar of the City of New York (the "Association") is a professional association of more than 20,000 attorneys, chartered to study, address and promote the rule of law and, where appropriate, the reform of the law. The Association, by its Committee on Federal Legislation, has followed attempts in recent years to enact line item veto

* Pursuant to Rule 37.6, this brief was authored and prepared in its entirety by the Association of the Bar of the City of New York.

legislation[1] and has carefully studied the Line Item Veto Act, 2 U.S.C. §§ 691 *et seq.* ("the Act"). For the reasons set forth below, the Association believes that the Line Item Veto Act is an effort to accomplish an unconstitutional end by unconstitutional means. If upheld, the Act will undermine, in fundamental and dangerous ways, the Constitution's mechanism for federal lawmaking. With the consent of the parties, the Association of the Bar of the City of New York respectfully submits this brief, as *amicus curiae*, and urges this Court to strike down the Act.

SUMMARY OF ARGUMENT

The Act offends the Constitution in several ways. First, the Act would rearrange the very structure of our government, taking significant responsibilities from Congress and transferring them to the executive. The allocation of power between these branches is laid out in detail in the Constitution, and Congress cannot change that structure by legislative fiat. Revisions of this magnitude require amendment to the Constitution. Second, by transferring to the President the power unilaterally to cancel portions of existing law, the Act violates the Presentment Clause and undermines the bicameral structure of Congress and the separation of powers. Furthermore, the Act is an impermissible effort by Congress to delegate to the President its most basic duty -- to determine what the law shall be. As such, it would radically upset the constitutionally contemplated process of political compromise within the legislative branch and between the legislative and executive branches. Finally, the Act establishes rules of procedure for succeeding Congresses, thereby violating the Rules Clause.

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[1] The Committee's published opinion on an earlier line item veto bill was read into the Congressional Record. 141 Cong. Rec. S4443-4449 (March 23, 1995).

ARGUMENT

POINT I

THE ACT VIOLATES THE PRESENTMENT CLAUSE AND OFFENDS THE PRINCIPLES OF BICAMERALISM AND SEPARATION OF POWERS

The Constitution diffuses power on several levels. Power is divided between the federal and state sovereigns. Federal power is further diffused among three branches and legislative power is reposed in two separate chambers. This separation of powers among the different branches of the federal government is at "the heart of [the] Constitution." *Buckley v. Valeo*, 424 U.S. 1, 119 (1976).

The processes by which these branches bring their diffused power to bear on federal law is spelled out in detail in the Constitution. As set forth below, the Line Item Veto Act impermissibly tampers with these processes and fundamentally realigns the Constitutional diffusion of power.

A. *Congress May Not Legislatively Alter The Lawmaking Requirements of Article I.*

This Court has stated that any fundamental change in the constitutional framework "must come not by legislation adopted either by Congress or by an individual State, but rather -- as have other important changes in the electoral process -- through the amendment procedures set forth in Article V." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

Article I, § 1 vests federal legislative power exclusively in a bicameral Congress. The Presentment Clause, Art. I, § 7, cl. 2, prescribes the precise procedures by which that legislature may make law:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes law, be presented to the President of the United States: If he approves he shall sign it, but if

> not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become Law. . . .[2]

The Presentment Clause thus requires that a bill first be passed in identical form by both the House and the Senate and be presented to the President. The President must then either (i) sign the *entire* bill into law, (ii) veto the *entire* bill and send it back to Congress for reconsideration; or (iii) do nothing, in which case the *entire* bill becomes law after ten days, unless Congress recesses within that time. Art. I, § 7, cl. 2.

The legislative steps outlined in Art. I are not empty formalities; they are commands which simultaneously require and limit the participation of both Houses of Congress and the President in lawmaking. *See Chadha*, 462 U.S. at 958 n.22. As such, they may be altered only by constitutional amendment. In *Chadha*, this Court explained:

> Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions

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[2] Exceptions to this procedure are carefully spelled out in the Constitution. Examples include the Senate's confirmation of Presidential appointments pursuant to Article II, § 2, cl. 2; the Senate's ratification of treaties pursuant to Article II, § 2, cl. 2; the sole power of the House of Representatives to initiate impeachment proceedings pursuant to Article I, § 2, cl. 5; the sole power of the Senate to hold trials and to convict following impeachment charges by the House of Representatives pursuant to Article I, § 3, cl. 6; the role of Congress in the election of a President pursuant to Article II, § 1 and the Twelfth Amendment; and the proposal of a constitutional amendment for submission to the states pursuant to Article V. *See Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 955-56 and 955-56 n.21. Furthermore, each house has the power to act alone in handling certain specified matters. Article I, § 5.

> of the Congress and of the Executive in the legislative process ... [the] provisions of Art. I are integral parts of the constitutional design for the separation of powers.... "[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document they drafted in Philadelphia in the summer of 1787." *Buckley v. Valeo*, 424 U.S. at 124. It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.

Id. at 945-51.

The Line Item Veto Act purports to work essential changes to that "finely wrought and exhaustively considered procedure." Wholly apart from the damage such changes would do to the Nation, it is clear that they cannot be achieved by statute. To change the very structure of its government by permitting a line item veto, this Nation must amend its Constitution. It has not.

B. *The Line-Item Veto Upsets the Constitutional Balance of Power*

The Line Item Veto Act would upset the constitutional framework by transforming the President's limited power -- the veto -- into a qualitatively different and far greater one -- the unilateral power to determine what bills, or parts of bills, shall become the law of the land. Indeed, the very purpose of the Act is to give the President this dramatically expanded power to change enacted law, rather than merely to execute it. The Act therefore violates the Presentment Clause and scrambles the constitutional principals of separation of powers and bicameralism.

The Constitution decrees that, to make, modify or repeal federal law, a bill must be approved by both houses of Congress. That bill may then be signed into law *in its entirety*;

allowed to become law *in its entirety* by virtue of the President's inaction for ten days; or enacted into law *in its entirety* by both houses of Congress overriding a Presidential veto.

The language of Article I, § 7, cl. 2 makes plain that bills are to be approved or disapproved and reconsidered *in toto*, not in part. Consequently, if the President wishes to prevent a bill from becoming law the President must return it in its *entirety* to Congress for "consideration," or refuse to sign the *entire* bill[3]. The Constitution does not authorize the President to accept part of a bill and reject the rest. The *in toto* requirement prevents any of the participants in the legislative process from unilaterally revising that which has been approved by the others and ensures that the bill that becomes law is the same bill that was passed by both houses of Congress.

The Line Item Veto Act disregards this constitutional mandate by authorizing the President to sign an entire bill into law and then immediately repeal portions of it -- in other words, to exercise a partial veto. Congress cannot, constitutionally, give the President the power to veto portions of a bill presented by Congress and then sign others into law, as defendants and *amici* below conceded. (*See* Def. Mem. at 13-14; *Amici* Mem.[4] at 29.) The Line Item Veto Act, however, would accomplish the same result, allowing bills to become law in different form than that which majorities in the House and the Senate passed.

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[3] The Presentment Clause uses the terms "it" or "its" 12 times, refers to "the bill" twice, and uses the terms "reconsider" or "reconsideration" three times. From the context in which those terms are used, both "it," "its," and "the Bill" refer to "Every Bill which shall have passed the House of Representatives and the Senate."

[4] "Def. Mem." refers to Defendants' Memorandum of Points and Authorities In Support of Defendants' Alternative Motion for Summary Judgment and In Opposition to Plaintiffs' Motion for Summary Judgment" filed in the District Court. "*Amici* Mem." refers to the Memorandum *Amici Curiae* of the Senate and Bipartisan Legal Advisory Group of the House of Representatives submitted to the district court.

Additionally, the Line Item Veto Act would significantly change the political gravity of the federal government. The Constitution contemplates, and the history of our Nation has always involved, a process of give and take between members of Congress and between Congress and the White House. The Line Item Veto would undercut this tradition by providing the President with a new and powerful club to wield over each individual member of Congress -- the authority to cancel expenditures of particular interest to that member, even after both houses have passed them and the President has signed them -- unless the member accommodates the President's wishes in other matters. To be confident that any expenditure would survive a line item veto, each member of Congress would be obliged to horse-trade with the President directly, as well as with other members, during the process of Congressional consideration of each such expenditure. This would effectively transform the President into a superlegislator -- a result which would stand the Framers' "finely wrought" system on its head.

This reality also belies the notion that the line item veto is limited to budgetary matters. While the Act restricts the use of the line item veto to budgetary matters, it is obvious that the President could use the threat of a line item veto to coerce cooperation from individual members of Congress on non-budgetary issues.

Such an unprecedented accumulation of power in presidential hands would fundamentally alter the nature of the law-making dialogue between the branches and would, to some extent, transfer the ultimate power of the purse from the legislature to the executive.[5]

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[5] The Framers had feared combining the power of the purse with the power of the sword. *See* The Federalist No. 58 (J. Cooke ed. 1961)(J. Madison)("[t]his power over the purse may, in fact, be regarded as the most compleat and effectual weapon with which any constitution can arm the immediate representatives of the people....").

C. *The Act Is An Unconstitutional Attempt to Delegate Congressional Authority.*

This Court has repeatedly held "the lawmaking function belongs to Congress, U.S. Const. Art. I, § 1, and may not be conveyed to another branch or entity." *Loving v. United States*, 116 S.Ct. 1737, 1744 (1996). Accordingly, "Congress manifestly is not permitted to abdicate or transfer to others the essential legislative functions with which it is . . . vested." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). "It is a breach of the National fundamental law if Congress gives up its Legislative power and transfers it to the President." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952)(Jackson, J., concurring)("the Executive, except for recommendation and veto, has no legislative power"); *Field v. Clark*, 143 U.S. 649, 692 (1891)("that Congress cannot delegate Legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution").

The Line Item Veto Act is, as the district court held, an unprecedented attempt by Congress to "alienate one of its basic functions" -- the power to rescind portions of legislation that have become the law of the land:

> the cancellation power conferred by the Act is indeed *revolutionary... Never before* has Congress attempted to give away the power to shape the content of a statute of the United States, as the Act purports to do. *As expansive as its delegations of power may have been in the past, none has gone so far as to transfer the function of repealing a provision of statutory law.*

(Op. at 31-32.)

Appellants and *amici* attempted below to characterize the Act as a delegation to the President of authority not to spend duly appropriated money subject to "intelligible principles"

articulated in the Act. This Court's holding in *J.W. Hampton*, however, illustrates that "intelligible principles" delegations differ significantly from this unconstitutional attempt by Congress to divest itself of lawmaking power. There, Congress had authorized the President to raise or lower import tariffs to equalize differences which, after factual investigation, the President found to exist between foreign and domestic production of similar products. 276 U.S. at 404-05. Because Congress lacked information about "changing conditions" necessary to make the required adjustments, the delegation was permitted "to give effect to the principle on which the statute proceeds." *Id.* Chief Justice Taft explained:

> The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.'

Id. at 407, *quoting Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton County*, 1 Ohio St. 77, 88-89 (1852).

Similarly, in *Field v. Clark*, 143 U.S. 649 (1891), Congress authorized the President to suspend temporarily the duty-free importing of specified goods if he found a country producing those goods imposed reciprocally unequal or unreasonable duties upon U.S. products. "Nothing involving the expediency or the just operation of such legislation was left to the determination of the President." *Id.* at 693. Congress determined when the law would be suspended and merely left it to the President to determine when, and if, those conditions arose. Faithfully adhering to this principle, this Court has from time to time permitted Congress to allow the Executive branch to provide technical expertise or determine whether certain specified conditions had occurred. *E.g. Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976)(President authorized to adjust petroleum imports by imposing license fees upon factual findings that specified

conditions had been met); *Yakus v. United States*, 321 U.S. 414 (1944) (executive may set price ceilings upon detailed factual determinations).

No such circumstance exists here. Congress is certainly able -- indeed, is constitutionally required -- to decide which spending items and tax benefits should be enacted into law and which should not. The Line Item Veto Act does not simply entitle the Executive branch to find facts, to discern contingencies or to apply expertise -- it invites the President to exercise discretion, unbound by any specified parameter, to retain parts of duly enacted legislation and to repeal others. In short, it is governed by no "intelligible principle" at all. This Court has never sanctioned so broad a congressional abdication of authority and should not now.

If the power of statutory repeal which the Act gives the President is ruled to be constitutional, Congress will be free to lay off on the President the power to rescind any existing law. There is no tenable constitutional distinction between Congress delegating its power to repeal appropriations or tax laws and delegating authority to repeal the civil rights laws, minimum wage laws, laws protecting health and the environment, or the criminal code.

POINT II

THE ACT VIOLATES THE RULES CLAUSE

The Rules Clause of the Constitution provides that "Each House may determine the rules of its proceedings ...." Art. I, § 5, cl. 2. The Line Item Veto Act is inconsistent with the Rules Clause for two reasons. First, one Congress is establishing procedural rules for the expedited consideration of disapproval bills by succeeding Congresses, thus precluding each chamber in succeeding Congresses from setting its own rules. Second, the Act allows the President to determine the items to be cancelled and thus limits the content of expedited disapproval bills. *See* 2 U.S.C. § 691.

The Rules Clause explicitly states that each house may determine its *own* rules of proceedings. Art. I, § 5, cl. 2. That

means that the membership of each chamber, sitting at the time, must have the ability to determine that chamber's internal rules. *Cf.* 103 Cong. Rec. 178 (1957)("the right of a current majority of the Senate at the beginning of a new Congress to adopt its own rules, stemming as it does from the Constitution itself, cannot be restricted or limited by rules adopted by a majority of the Senate in a previous Congress.") Thus, one Congress cannot prevent a succeeding Congress from changing the rules of its proceedings. *See United States v. Ballin*, 144 U.S. 1, 5 (1892) ("[t]he power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal").

Thus, each chamber has the power and authority to set its own rules regarding a variety of internal matters[6]. The problem with legislation, such as the Act, which restricts the rule-making power of either chamber is that such legislation can only be abrogated by a subsequent piece of legislation. That second piece of legislation must be passed by *both* chambers and either approved by the President or enacted over the President's veto. This is inconsistent with the Rules Clause. Legislation, such as the Act, affecting the internal rule-making power of either chamber also results in one chamber of Congress exercising partial control over the internal rules of the other chamber. While the Constitution grants each chamber the power to set its own rules, that power can only be exercised in conformity with constitutional constraints. *See United States v. Ballin*, 144 U.S. at 5; *United States v. Smith*, 286 U.S. 6, 33 (1932).

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[6] *See e.g.*, Rules of the House of Representatives, 102nd Cong. *reprinted* in Congressional Quarterly's Guide to Congress, pp. 20-A to 62-A (4th ed. 1991); Senate Manual, 103rd Cong., 1st Sess. (1993)(Senate Document 103-1).

Several sections of the Act violate the Rules Clause by controlling Congress' internal rules and procedures as well as the form and content of bills.

Section 691d(a) specifies particular committees within both the House and Senate to which the President's special message shall be referred. Committee referral is a matter of the internal organization and procedures of each chamber and the Act's attempt to establish matters of committee referral for succeeding congresses violates the Rules Clause.

Section 691d(b) sets forth certain time parameters within which Congress must act upon any expedited disapproval bill. Such time parameters prevent succeeding chambers from setting their own calendar and determining when and which bills shall be heard or voted upon, another clear violation of the Rules Clause.

Sections 691d(d) and (e), which deal with consideration in the House and the Senate, respectively, also violate the Rules Clause by controlling Congress' internal rules and procedures. Subsection (d), for example, limits debate in the House on disapproval bills, precludes motions to reconsider a vote and restricts the making of other motions. Subsection (e) imposes similar limitations on proceedings in the Senate.

Finally, section 691d(f) infringes on the ability of each chamber to determine its own rules of proceedings with respect to a conference report. In connection with the House's consideration of a conference report, subsection (f)(2) limits debates and debatable motions and a motion to recommit is not in order. Similarly, in connection with the Senate's consideration of a conference report, subsection f(3) limits debate and a motion to recommit is not in order. Finally, subsection (f)(4) places limits on the contents of certain bills when there are disagreements in amendments to disapproval bills and certain other amendments in the nature of a substitute.

CONCLUSION

The Line Item Veto Act transfers to the President the fundamental legislative power of deciding what programs should exist. For over 200 years our system of government, as framed by the Constitution, has been just the opposite. The purpose of the Line Item Veto Act is a truly revolutionary attempt to spare Congress difficult decisions about which programs should exist by having the President make those decisions in its stead. Upholding this effort would place the entire system of federal lawmaking, and the separation of powers itself, in grave jeopardy. This Court must, on this occasion, protect Congress from itself, and thereby protect the Nation.

Respectfully submitted,

ASSOCIATION OF THE BAR OF THE
CITY OF NEW YORK
42 West 44th Street
New York, New York 10036-6690
(212) 382-6600
LOUIS A. CRACO, JR., Chair,
JAMES F. PARVER
Committee on Federal Legislation

DAVID P. FELSHER
Counsel of Record